



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09-52; FCC 11-190]

Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopted procedures designed to promote the initiation of commercial FM radio service by and to Native American tribes, by providing a procedure for such tribes to establish threshold qualifications when applying for commercial FM allotments added to the Table of Allotments using the Commission's Tribal Priority.

DATES: The rules and policies established in this order contain information collection requirements that have not been approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date.

ADDRESSES: Peter Doyle or Thomas Nessinger, Federal Communications Commission, Media Bureau, Audio Division, 445 12th Street, S.W., Room 2-B450, Washington, DC 20445.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418-2700 or Peter.Doyle@fcc.gov; Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418-2700 or Thomas.Nessinger@fcc.gov.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202-418-2918, or via the Internet at Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Third Report and Order (Third R&O), FCC 11-190, adopted December 28, 2011, and released December 29, 2011. The full text of the Third R&O is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW, Room CY-A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW, Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, <http://www.bcpi.com>, or call 1-800-378-3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

Paperwork Reduction Act of 1995 Analysis

This Third R&O adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA) (Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in 44 U.S.C. 3501-3520)). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. The Commission will publish a separate notice in the Federal Register inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the

effective date of the information collection requirements. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), it previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

Synopsis of Order

1. In the Third R&O, the Commission addressed the proposals set forth in the Second Further Notice of Proposed Rule Making (Second FNPRM) that accompanied the Second Report and Order in this proceeding (76 FR 9797, March 4, 2010, FCC 11-28, rel. Mar. 3, 2011) (Second R&O). The Tribal Priority gives qualified Native American Tribes and Alaska Native Villages (Tribes) a priority under section 307(b) of the Communications Act when seeking to establish new radio stations that primarily cover tribal lands. Because applicants for new AM broadcast and FM noncommercial educational (NCE) broadcast stations submit showings under section 307(b) at the time of filing an application for construction permit, the Tribal Priority gives Tribes an advantage over applicants filing mutually exclusive proposals. However, in the case of commercial FM broadcast stations, there is a two-step application process: first, the FM channel is allotted at a selected community, and the section 307(b) evaluation is made at this stage of the process. Second, the FM allotment is auctioned, with any party desiring to do so participating in the auction. An application for an FM commercial construction permit is only filed after the auction is held, and only by the winning bidder.

2. Recognizing “the risks inherent in applying a section 307(b) preference at the allotment stage for auctionable non-reserved band spectrum,” (First Report and Order, 75

FR 9797, Mar. 4, 2010, FCC 10-24, rel. Feb. 23, 2010), the Commission sought comment in the Further Notice of Proposed Rule Making, 75 FR 9856, March 4, 2010, FCC 10-24, rel. Feb. 23, 2010 (FNPRM) in this proceeding on whether to establish an auction bidding credit for Tribes seeking to provide commercial FM radio service to their Tribal Lands and members. The Tribal bidding credit was originally proposed to mitigate concerns that, due to the two-step nature of the commercial FM licensing process, Tribes or Tribal entities that employ the Tribal Priority to obtain FM allotments might be outbid by competing, non-Tribal applicants. The only commenters to address this issue proposed a 35 percent bidding credit that would be available to Tribes or Tribal entities that participated in the allotment proceeding for the FM channel being auctioned, regardless of new entrant status, along with an additional 25 percent new entrant bidding credit to Tribes with no interests in media of mass communications, for a total maximum bidding credit of 60 percent.

3. The Commission found the record inconclusive as to the effectiveness of tribal bidding credits. The Commission was unclear as to whether and how it could craft such credits so as to meaningfully advance its goals consistent with the competitive bidding mandate of 47 U.S.C. 309(j). On further consideration, the Commission believed an alternative approach might be more effective to achieve its policy goals and would be more consistent with its statutory mandate to license spectrum in the public interest. The Commission thus sought comment, in the Second FNPRM, on whether to require, as a threshold qualification to apply for a commercial FM channel allotted pursuant to the Tribal Priority, that applicants qualify for a Tribal Priority for the channel. Under this approach, a Tribe or Tribal entity applying for an FM channel allotted based on the Tribal

Priority would be required to establish at the application stage its qualifications to provide the service for which the channel was specifically allotted.

4. The Commission stated that the proposed threshold qualifications would be more effective than tribal bidding credits in advancing the Tribal Priority's goals. As set forth in the First R&O, the Priority is premised on the unique ability of Tribes and Tribal entities to serve their Tribal communities "[b]ecause of their status as sovereign nations responsible for, among other things, 'maintaining and sustaining their sacred histories, languages, and traditions.'" (First R&O, 25 FCC Rcd at 1587-88). As the Commission previously noted, the identity of the service provider to Tribal areas is critical to Tribal Priority-based allocations. Whereas in AM and NCE radio services the Tribal Priority generally operates as a dispositive preference in the application process, guaranteeing that a qualified applicant will obtain the license, commercial FM licensing is a two-step process in which a dispositive preference at the initial, allotment stage does not guarantee the grant of a license in the second, application step. An unavoidable consequence of the auctions process is that Tribes and Tribal entities uniquely qualified to serve their communities may be outbid in the commercial FM application process by non-Tribal applicants that file mutually exclusive applications. At best, Tribal bidding credits could only enhance the competitive position of Tribal applicants. They could not, however, completely eliminate the risk of qualified Tribal applicants being outbid, thereby frustrating the Commission's goals in allocating the channel pursuant to the Tribal Priority. In contrast, the proposed threshold qualification requirement would ensure that only a Tribe or Tribal entity qualified to provide the unique service contemplated by the allocation is eligible for the license to provide that service. Such an approach would set

the commercial FM service on the same footing as other radio services with regard to the Tribal Priority, and avoid undermining the Commission's policy goals in establishing the Tribal Priority.

5. The Commission further stated that the proposed threshold qualifications would be consistent with its statutory mandate under 47 U.S.C. 309(j)(6)(E), which provides, in pertinent part, that “[n]othing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings.” The use of threshold qualifications would serve the public interest because the premise of the Tribal Priority is a Tribe's or Tribal entity's unique ability to serve the needs and interests of its local community. Unlike a prohibited “pioneer's preference,” which would favor the application of the party that petitioned to add an allotment using the Tribal Priority, the threshold qualification would be based on the Tribe's or Tribal entity's ability to fulfill the purpose for which the channel was allotted under the Tribal Priority, rather than on its participation in the allotment proceeding. Thus, eligible Tribes or Tribal entities may be eligible to apply for a channel allotted pursuant to the Tribal Priority even if they did not petition for the allotment. To the extent that mutually exclusive applications may still be filed under the proposed threshold qualifications approach, thus requiring competitive bidding, the bidders would initially be limited to qualified Tribes and Tribal entities, so the Commission's policy goals would not be frustrated. In the Second FNPRM, the Commission also asked whether to adopt an exception to the general prohibition of collusion set forth in 47 CFR 1.2105(c), applicable to mutually exclusive applications in

the commercial FM broadcast service, so that Tribes or Tribal entities that file mutually exclusive applications for a channel allotted pursuant to the Tribal Priority could have an opportunity to resolve any mutual exclusivities through engineering solutions or settlement.

6. The Commission received two comments and one reply comment on these issues: NPM and NCAI again filed joint comments, and Gila River Telecommunications, Inc. (GRTI) filed comments and reply comments. All commenters supported the threshold qualifications approach as proposed in the Second FNPRM, and supported the proposal to allow settlements among qualifying mutually exclusive Tribal applicants. All commenters also concurred an FM allotment added by a qualified Tribe or Tribal-owned entity using the Tribal Priority (Tribal Allotment) should be initially awarded only to a Tribe or Tribal entity, and should remain reserved for such an entity even if no Tribal applicants meeting such threshold qualifications express interest in a Tribal Allotment when initially offered. NPM/NCAI in particular believed that it would frustrate the purpose of the Tribal Priority to open, then abruptly close, a Tribal filing window, only to offer the Tribal Allotment to non-Tribal applicants, given that many financial, technical, and geographic obstacles exist to the rapid deployment of broadcast radio service to tribal lands. NPM/NCAI thus argued that any threshold qualifications plan should account for such obstacles, and should allow sufficient time for Tribes to finance and construct facilities. GRTI, while agreeing with NPM/NCAI on this point, added that some Tribes are prepared and eager to begin station construction quickly, but that such desires can be thwarted by what it perceives as Commission delays. GRTI thus suggested that the

Commission implement an “expedited processing” system for Tribes meeting threshold qualifications and proposing new AM, full-power FM, and low-power FM facilities.

7. Based on the Commission’s examination of the record in this proceeding, it adopted the proposed threshold qualifications approach to commercial FM application processing as set forth below, including measures to address situations in which Tribes and Tribal entities require additional time to apply for a license. While committed to assisting Tribes in establishing radio service meeting the needs of their communities and citizens, the Commission was also mindful of its fundamental interest in expediting new radio service to communities and preventing the so-called “warehousing” of scarce spectrum. The latter concern militates against procedures that would unreasonably delay authorizing new stations, or tie up spectrum for indefinite periods of time. To some extent, a Tribe may time the award of a new FM commercial facility by petitioning for a new Tribal Allotment only when it is ready to commence construction (although, in certain areas where spectrum is more scarce, Tribes could also reasonably conclude that the risks of deferring application filing are too great). Moreover, while there do exist financial obstacles to initiating new broadcast service, the procedures proposed in the Second FNPRM apply only to commercial FM facilities, which by their nature are intended to be financially self-sustaining. Finally, as GRTI pointed out in its comments, some Tribes are ready, willing, and able to commence construction immediately, and would be disserved by any process that includes built-in delays. The adopted procedures are intended to balance these concerns by accommodating both those Tribes and Tribal entities that wish to initiate commercial FM service quickly and those that might need

additional time to muster the resources needed to apply for a new station and complete construction.

8. Under the threshold qualifications procedure adopted herein, once a Tribal Allotment is allocated, as set forth in the First R&O, within a reasonable period of time after publication of the new allotment in the Federal Register, the Commission will announce by Public Notice a Threshold Qualifications Window (TQ Window). During the TQ Window, any Tribe or Tribal entity that could qualify to add that particular Tribal Allotment, including the original proponent of the allotment, may file FCC Form 301 for the Tribal Allotment (the original Tribal Allotment proponent will already have filed FCC Form 301 simultaneously with its Petition for Rule Making proposing the new allotment, under established Commission procedures; thus, the original Tribal Allotment proponent need only submit a notice stating that it wishes its pending Form 301 application to be processed immediately, or it may file an amendment to its pending Form 301 application during the TQ Window, as appropriate). Such an applicant must demonstrate that it meets all of the following eligibility criteria for grant of a Tribal Priority at the allotment stage:

- (A) The applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes. Qualifying Tribes or Tribal entities must be those at least a portion of whose Tribal Lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of

whose Tribal Lands lie within the proposed facility's principal community contour;

- (B) (1) At least 50 percent of the area within the proposed principal community contour is over that Tribe's Tribal Lands, or (2) the proposed principal community contour (a) encompasses 50 percent or more of that Tribe's Tribal Lands, (b) serves at least 2,000 people living on Tribal Lands, and (c) the total population on Tribal Lands residing within the proposed station's service contour (the class reference contour as set forth in 47 CFR 73.211(b), which is the 1mV/m [60 dBμ] contour) constitutes at least 50 percent of the total covered population (and, in the case of either (B)(1) or (B)(2), the proposed station's principal community contour does not cover more than 50 percent of the Tribal Lands of a Tribe that is not a party to the application). To the extent that a Tribe lacks Tribal Lands, the applicant may demonstrate eligibility for waiver of the above-listed tribal land coverage provisions, by demonstrating a geographic area identified with the Tribe. See Second R&O, 26 FCC Rcd at 2561-63. Likewise, the Commission will consider requests for waiver of the other requirements where appropriate;
- (C) The proposed community of license must be located on Tribal Lands; and
- (D) The proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license (see First R&O, 25 FCC Rcd 1583, 1596-97 (2010); Second R&O, 26 FCC Rcd at 2561-63, 2586-87).

9. If only one acceptable application is filed during the TQ Window, whether by the original Tribal Allotment proponent submitting notification to process its application immediately or by another qualified applicant, that application will be processed promptly, and the Tribal Allotment will not be auctioned. Absent an affirmative submission by the original Tribal Allotment proponent during the TQ Window notifying the Commission that it wishes its Form 301 application to be processed immediately, the allotment proponent's already-filed Form 301 application will not be considered an "acceptable application" at this stage of the threshold qualifications proceeding. In the event that two or more acceptable applications are filed during the TQ Window, the Commission will announce a limited period, after the close of the TQ Window but before the next FM auction, in which the parties may negotiate a settlement (including a time-sharing agreement) or bona fide merger, as a way of resolving the mutual exclusivity between their applications. Any such settlement or merger will be subject to the same limits and conditions as other agreements for resolving application conflicts (see 47 CFR 73.3525). Technical solutions will not be allowed as settlements. Unlike the case of competing new commercial AM applications (some groups of which are allowed to resolve their mutual exclusivity by means of engineering solutions), in which each mutually exclusive applicant has submitted a discrete engineering proposal in its application which may be amended, a Tribal Allotment will have been added to the Table of Allotments (47 CFR 73.202) only after it has undergone the allocations rulemaking process. That process involves not only a complete engineering review of the proposed allotment, but also consideration of comments and, often, competing allotment proposals. Allowing a post-allocation technical solution that would result in grant of

more than one FM allotment would effectively circumvent the FM allocations rulemaking process, and the right of parties to file comments and counter-proposals that is inherent in that process. If there are other fully spaced channels that could accommodate another Tribal Allotment, one of the competing applicants could simply petition to add such an allotment through the normal allocations rulemaking process. If, however, there are no channels available, the Commission declined GRTI's suggestion that it relax its spacing or other rules designed to prevent interference among stations. A settlement that establishes technically deficient Tribal stations is not an effective means to establish viable and needed radio service to Tribal Lands.

10. If a settlement or merger is reached, the parties shall so notify the Commission as set forth in the Public Notice announcing the TQ Window. The Commission's staff will promptly begin processing the surviving application pursuant to the settlement or merger. If a settlement or merger cannot be reached among the mutually exclusive applicants, the Tribal Allotment will be auctioned during the next scheduled FM auction. However, at that time only the applicants whose applications were accepted for filing during the TQ Window, as well as the original Tribal Allotment proponent, will be permitted to bid on that particular Tribal Allotment, i.e., bidding on that allotment will be closed to all other potential applicants. The closed group of mutually exclusive TQ Window applicants must comply with generally applicable auction procedures (e.g., by correctly completing Form 175 and timely making an upfront payment; see 47 CFR 1.2105-1.2106, 73.5002). In the event that only one Tribal applicant qualifies to bid in the first auction of a Tribal Allotment, it must submit an upfront payment and enter a bid during the auction in order to obtain the construction

permit. The winning bidder for the Tribal Allotment must comply with all auction rules for winning bidders in order to be awarded the construction permit; that is, it must timely make any required down and final payments, and must timely file FCC Form 301 (or, in the case of the original proponent of the Tribal Allotment, amend its pending Form 301 or advise the staff that its pending Form 301 application may be processed). See 47 CFR 1.2107, 1.2109, 1.2112, 73.5003, 73.5005.

11. In the NCE FM context, the Commission's rules impose a holding period on authorizations granted pursuant to a Tribal Priority, for a period beginning from the award of a construction permit through four years of on-air operations, prohibiting community of license changes and/or technical changes that would result in the modified facility no longer qualifying for a Tribal Priority. See First R&O, 25 FCC Rcd at 1586, 1593, 1596-97. This is to discourage trafficking in authorizations granted pursuant to the Tribal Priority, which could frustrate the goals of the priority and potentially harm the communities that the Tribal Priority is intended to benefit. The same rationale applies in the commercial FM context with regard to authorizations awarded (1) to a singleton TQ Window applicant, (2) after a settlement among TQ Window applicants, and (3) after an auction among a closed group of bidders composed only of threshold qualified tribal applicants. Accordingly, the permittee or licensee of an authorization awarded to a TQ Window singleton, after a post-TQ window settlement, or after an auction to a closed group of threshold qualified tribal applicants, is prohibited from assigning or transferring the authorization, except to another party that qualifies for the Tribal Priority under which the Tribal Allotment was awarded in all respects, for a period beginning from the award of a construction permit through four years of on-air operations.

12. In the event that no qualifying party applies during the TQ Window, and the Tribal Allotment proponent requests that its pending FCC Form 301 application not be immediately processed (by sending a letter to the Audio Division, Media Bureau, staff during the TQ Window), the Tribal Allotment will be placed in a queue to be auctioned in the normal course for vacant FM allotments. When the Tribal Allotment is offered at auction for the first time, only applicants meeting the threshold qualifications (those who would have qualified to add the Tribal Allotment, including the original proponent of the allotment, as detailed above) may specify that particular Tribal Allotment on FCC Form 175, Application to Participate in an FCC Auction. Any applicant not meeting threshold qualifications that selects the Tribal Allotment in its Form 175 application will be prohibited from entering a bid for the Tribal Allotment. Qualifying Tribal applicants must, as noted above, otherwise qualify to bid at auction, and must comply with all Commission rules relating to the conduct of auctions and award of construction permits to winning bidders, as discussed above.

13. Should no qualifying party apply to bid on a Tribal Allotment in the first auction in which it is offered, or should no such party qualify to bid in the first auction in which a Tribal Allotment is offered, then the Tribal Allotment will be offered in a subsequent auction or auctions, and any applicant, whether or not a Tribe or Tribal entity, may apply for the Tribal Allotment. The Commission declined to adopt the commenters' suggestion that a Tribal Allotment only be offered for initial licensing to a qualifying Tribe or Tribal entity in perpetuity. Such a prohibition would frustrate the policies favoring expeditious initiation of radio service, and disfavoring the practice of allowing spectrum to lie fallow for indefinite periods.

14. Due to the Commission's adoption of the threshold qualifications approach, it did not adopt its original proposal of a Tribal bidding credit. The Commission continues to believe that a bidding credit, of whatever magnitude, is insufficient to ensure that Tribal Allotments will end up in the hands of qualifying Tribal applicants. See Second R&O, 26 FCC Rcd at 2588-89. It is expected that, under the procedures adopted, the majority of FM commercial Tribal Allotments will be awarded through the TQ Window approach. Moreover, to the extent that multiple qualifying Tribes or Tribal entities would bid on a Tribal Allotment at auction, all would likely qualify for the same Tribal or new entrant bidding credits. Adding a bidding credit to the procedures adopted here would therefore serve no purpose.

15. The procedures adopted here are designed to accommodate both those Tribes and Tribal entities seeking to establish new commercial FM services quickly, and those Tribes needing more time to marshal their resources. These procedures also align with Congress's direction that the Commission use threshold qualifications to avoid mutual exclusivity in application and licensing proceedings when it is in the public interest to do so. 47 U.S.C. 309(j)(6)(E). Most importantly, these procedures provide the best means of assuring that FM commercial allotments pursuant to the Tribal Priority will be awarded to qualifying Tribes or Tribal entities, thus achieving the goals of the Tribal Priority.

16. The Commission realizes that any process leading to deployment of communications services on Tribal lands and removing barriers to entry must recognize Tribal sovereignty and self-determination, the unique needs and priorities of Native Nations and Tribal communities, and the importance of consultation and coordination

with Tribal government and Native community leaders. It has historically acknowledged “the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.” See Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000). To that end, the Commission directed the Office of Native Affairs and Policy (ONAP) and the Audio Division of the Media Bureau (AD) to coordinate in establishing informational materials and training opportunities for Tribes and Tribal entities, in order to help them better understand the complexities of the threshold qualification and licensing processes established herein. Additionally, ONAP and AD were directed, as appropriate, to remain available to consult with Tribal applicants on any questions that they may have at any stage of the radio application and licensing processes, especially as they relate to Tribal licensing priorities. *Id.* at 4082.

Final Regulatory Flexibility Analysis.

17. As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second FNPRM to this proceeding. The Commission sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA. See 5 U.S.C. 604.

Need for, and Objectives of, the Report and Order.

18. In the Third R&O, the Commission adopted new procedures under which commercial FM allotments added using the Commission’s Tribal Priority may be awarded to tribal applicants meeting the threshold qualifications for adding such an

allotment. The new procedures were adopted in order to provide a significant opportunity for the award of such tribal allotments to tribal applicants, in keeping with the goals underlying the Commission's Tribal Priority.

19. The further rulemaking proceeding leading to the Third R&O was initiated to obtain further comments concerning an alternative proposal to assist Native American Tribes and Alaska Native Villages (Tribes) seeking to establish new commercial FM service to Tribal communities. In the Further Notice of Proposed Rulemaking, the Commission proposed an auction bidding credit to Tribes and entities owned by Tribes. The Commission received only one proposal for a potential tribal bidding credit: to grant Tribes a 35 percent Tribal Bidding Credit (TBC), to be added to any new entrant bidding credit for which they may qualify, to a maximum of 60 percent. The Commission believed this record was inconclusive to adopt a TBC, and further believed it was unclear whether and how a TBC could be crafted to advance the dual goals of increasing Tribal ownership of radio facilities and maximizing the value of spectrum through competitive bidding, as mandated by 47 U.S.C. 309(j). On further consideration, the Commission determined that an alternative approach would more effectively achieve the policy goals underlying the Tribal Priority adopted in the First R&O in this proceeding, 25 FCC Rcd at 15896-97, and be more consistent with its statutory mandate. See 47 U.S.C. 309(j)(6)(E).

20. Specifically, in the Second FNPRM the Commission sought comment on whether to require, as a threshold qualification to apply for a commercial FM channel allotted pursuant to the Tribal Priority, that applicants qualify for a Tribal Priority for that channel. Such an approach is consistent with other procedures used by the Commission,

such as those used to reserve vacant FM allotments for noncommercial educational (NCE) use. Additionally, while the Tribal Priority operates as a dispositive preference in the AM commercial and FM NCE application contexts, as currently formulated the priority is not dispositive for FM commercial stations, because a Tribe that adds an FM allotment using the Tribal Priority may still be outbid at auction by a non-Tribal applicant. The alternative approach proposed by the Commission would correct this asymmetry, and would also more effectively ensure that FM allotments added using the Tribal Priority are ultimately licensed to Tribes, who would use such FM channels for their intended purposes of promoting Tribal language, culture, and self-government. The Commission therefore sought comment on this alternative approach and its potential ramifications, including whether non-Tribal applicants should be allowed to apply for FM allotments added using the Tribal Priority, but for which no Tribe expresses interest. The Commission also sought additional input from commenters on the TBC, and on other ways in which the Commission could promote commercial Tribal radio service, including comment on potential barriers that may discourage Tribal participation in the broadcast auction and licensing processes.

21. Commenters on these issues favored the adoption of the threshold qualifications procedure, as the best means of ensuring that Tribal-added FM allotments would ultimately be licensed to those whom the Tribal Priority was meant to benefit. Native Public Media and the National Congress of American Indians (NPM/NCAI), filing joint comments, expressed concern that expedited procedures would force Tribes to receive construction permits before they were financially and technically able to construct facilities. Another commenter, Gila River Telecommunications, Inc. (GRTI),

agreed, but at the same time argued that there should be expedited threshold qualifications procedures for those Tribal applicants who are ready and able to begin station construction. All commenters agreed that Tribal allotments should not be made available to non-Tribal applicants at any time. Commenters also agreed that, if the threshold qualifications procedure were not adopted, a TBC of up to 60 percent should be afforded to Tribal applicants for FM allotments added using the Tribal Priority.

22. In the Third R&O in this proceeding, the Commission adopted the threshold qualifications procedure proposed in the Second FNPRM. Under the threshold qualifications procedure, once a commercial FM allotment is allocated using the Tribal Priority (Tribal Allotment), within a reasonable time thereafter the Commission staff will announce by Public Notice a Threshold Qualifications Window (TQ Window). During the TQ Window, any Tribe or Tribal entity that could qualify to add that particular Tribal Allotment may file FCC Form 301 for the Tribal Allotment. The original Tribal Allotment proponent, which will already have filed Form 301 at the time it proposed the allotment, must submit to the staff a notice stating that it wishes its already-filed Form 301 application to be processed immediately, or make that statement in an amendment to its Form 301. An applicant in the TQ Window must demonstrate that it meets all of the eligibility criteria for grant of a Tribal Priority at the allotment stage. See paragraph <8>, above.

23. If only one acceptable application is filed during the TQ Window, whether by the original Tribal Allotment proponent submitting notification to process its application immediately or by another qualified applicant, that application will be processed promptly, and the Tribal Allotment will not be auctioned. In the event that two

or more acceptable applications are filed during the TQ Window, the Commission will announce a limited period, after the close of the TQ Window but before the next FM auction, in which the parties may negotiate a settlement (including a time-sharing agreement) or bona fide merger, as a way of resolving the mutual exclusivity between their applications. There is precedent for such settlements or mergers in the AM auction context, involving certain mutually exclusive applicants for new and modified AM stations. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order, 13 FCC Rcd 15920, 15927 (1998), (subsequent history omitted). If a settlement or merger is reached, the parties shall so notify the Commission as set forth in the Public Notice announcing the TQ Window. The staff will promptly begin processing the surviving application pursuant to the settlement or merger. If a settlement or merger cannot be reached among the mutually exclusive applicants, the Tribal Allotment will be auctioned during the next scheduled FM auction. However, at that time only the applicants whose applications were accepted for filing during the TQ Window, as well as the original Tribal Allotment proponent, will be permitted to bid on that particular Tribal Allotment, i.e., bidding on that allotment will be closed to all other potential applicants. The closed group of mutually exclusive TQ Window applicants must comply with generally applicable auction procedures. The winning bidder for the Tribal Allotment must comply with all auction rules for winning bidders in order to be awarded the construction permit; that is, it must timely make any required down and final payments, and must timely file FCC Form 301 (or, in the case of the original proponent

of the Tribal Allotment, amend its pending Form 301 or advise the staff that its pending Form 301 application may be processed).

24. In the event that no qualifying party applies during the TQ Window, and the original Tribal Allotment proponent requests that its pending FCC Form 301 application not be immediately processed, the Tribal Allotment will be placed in a queue to be auctioned in the normal course for vacant FM allotments. When the Tribal Allotment is offered at auction for the first time, only applicants meeting the threshold qualifications (those who would have qualified to add the Tribal Allotment, including the original proponent of the allotment) may specify that particular Tribal Allotment on FCC Form 175, Application to Participate in an FCC Auction. Any applicant not meeting threshold qualifications that selects the Tribal Allotment in its Form 175 application will be prohibited from entering a bid for the Tribal Allotment. Qualifying Tribal applicants must, as noted above, otherwise qualify to bid at auction, and must comply with all Commission rules relating to the conduct of auctions and award of construction permits to winning bidders. Should no qualifying party apply to bid on a Tribal Allotment in the first auction in which it is offered, or should no such party qualify to bid in the first auction in which a Tribal Allotment is offered, then the Tribal Allotment will be offered in a subsequent auction or auctions, and any applicant, whether or not a Tribe or Tribal entity, may apply for the Tribal Allotment. A Tribal Allotment won in an open auction (that is, one open to non-threshold qualified applicants) will not be subject to the four-year prohibition on assignment or transfer (but will still be subject to a four-year prohibition on community of license or technical changes). Because of the similarity of the new threshold qualifications procedures to the procedures for awarding NCE

construction permits based on the Tribal Priority (namely, to discourage trafficking in such permits so that they will be used to further the goals of the Tribal Priority by enabling Tribes or tribal entities to broadcast to Tribal Lands), the Commission will impose the same holding period prohibition on commercial FM permits awarded using the threshold qualifications procedures. The Commission will therefore prohibit the permittee or licensee of an authorization awarded to a TQ Window singleton, after a post-TQ window settlement, or after an auction to a closed group of threshold qualified tribal applicants, from assigning or transferring the authorization, except to another party that qualifies for the Tribal Priority under which the Tribal Allotment was awarded in all respects, for a period beginning from the award of a construction permit through four years of on-air operations.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA.

25. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.

26. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. 5 U.S.C. 603(b)(3). The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.” 5 U.S.C. 601(6). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business

Act. 5 U.S.C. 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

27. The rules and policies adopted in the Third R&O will primarily apply to Tribes, consortia of Tribes, and entities 51 or more percent owned by Tribes or consortia, that apply for commercial FM radio stations, but potentially will apply to all AM and FM radio broadcasting licensees and potential licensees, to the extent that they may ultimately be allowed to apply for Tribal Allotments in the event that qualified Tribal applicants do not do so. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. 15 U.S.C. 632. Included in this industry are commercial, religious, educational, and other radio stations. *Id.* Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. *Id.* However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. *Id.* The SBA has established a small business size standard for this category, which is: firms having \$7 million or less in annual receipts. 13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008). According to BIA/Kelsey, MEDIA Access Pro Database on November 1, 2011, 10,785 (97%) of 11,127 commercial radio stations have revenue of \$7 million or less. Therefore, the majority of such entities are small entities. Please note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. This

estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

Description of Projected Reporting, Record Keeping and other Compliance Requirements.

28. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on most applicants. The new procedures will only apply to Tribes and entities majority owned by Tribes, which do not constitute the majority of commercial FM applicants. Moreover, because of the geographic limits of commercial FM allotments, and the qualifying criteria for the Tribal Priority, the number of threshold qualified applicants for a given allotment will likely be small. Questions will be modified in FCC Form 301 to indicate whether the applicant is applying for a Tribal Allotment, and certifying that it qualifies for the Tribal Priority for that particular Tribal Allotment. These are largely self-identification questions reflecting the applicant's status, although in the case of eligibility for the Tribal Priority some geographic analysis may be required, and/or a showing may be needed to establish eligibility for the Tribal Priority in the absence of tribal lands as defined in the First R&O. Additionally, questions will have to be added to FCC Form 175, in the case of Tribal Allotments that proceed to competitive bidding, in order to establish the applicant's eligibility to apply for a Tribal Allotment in the first instance. However, these burdens should be moderate to minimal, as it is anticipated that a substantial number of commercial tribal FM allotments will be awarded before the auction stage, and many threshold qualified tribal applicants will have established their qualifications before auction, either at the allocations stage or during a TQ window. In any event, such

burdens are needed in order to achieve the Commission's statutory mandate of fair, efficient, and equitable distribution of radio service (and, in the case of Tribal Priority claimants, are necessary in order to open up the Tribal Priority to greater numbers of Tribes seeking to establish new radio service). Certain notifications may also be required of some applicants, for example, notification that a Tribal Allotment proponent wishes its already-filed FCC Form 301 application to be considered in the TQ Window, or a request for approval of a merger or settlement agreement among TQ Window applicants. The remaining procedural changes in the Third R&O are changes in Commission procedures, requiring no input from applicants. For example, under the new threshold qualifications procedure, the Commission will have to generate Public Notices setting forth procedures for TQ Windows, or modify auction Public Notices to set forth special procedures for Tribal Allotments being auctioned.

Steps Taken to Minimize Significant Impact of Small Entities, and Significant Alternatives Considered.

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 5 U.S.C. 603(c)(1) – (c)(4).

30. With regard to the proposals in the Second FNPRM, NPM/NCAI expressed concern about the ability of some Tribes to act quickly to construct and license new commercial FM stations. There is, according to NPM/NCAI, a significant and adverse economic impact that some Tribes face when seeking to initiate new radio service. Factors causing such an adverse economic impact include lack of capital or federal program support; short construction seasons in many Tribal areas; complications with regard to tower siting, due to factors such as preservation of sacred sites and Bureau of Indian Affairs land use policies; and lack of easy access to materials and engineering expertise. While not disagreeing with NPM/NCAI on this issue, GRTI pointed to what it perceives as Commission delays in allocating new FM allotments and making them available for auction, delaying the initiation of new service by Tribes ready and able to begin construction immediately. In order to accommodate these dual concerns, the Commission adopted a threshold qualifications approach to Tribal commercial FM allotments that provides an early opportunity for application for Tribes that are ready to commence construction, as well as a later opportunity (up to, but likely no more than, two years) for those Tribes that may lack the resources to commence construction soon after a channel is allotted using the Tribal Priority. In this way, the Commission's adopted procedure is designed to reduce the burdens on these groups of potential applicants, based on the concerns expressed in their comments. Although the Commission could have adopted strictly an expedited threshold qualifications procedure – awarding a construction permit for a Tribal Allotment through a TQ Window opened shortly after allocation of the Tribal Allotment – this would have forced those Tribes lacking the resources to commence construction immediately either to delay proposing an allotment

or to risk expiration of the construction permit before construction could be completed. Accordingly, by adopting the TQ Window process over the proposed alternative of an expedited threshold qualifications procedure, the Commission has chosen the alternative that imposes a substantially less significant economic impact.

Report to Congress.

31. The Commission will send a copy of the Third R&O, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801(a)(1)(A)). In addition, the Commission will send a copy of the Third R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Third R&O and FRFA (or summaries thereof) will also be published in the Federal Register (See 5 U.S.C. 604(b)).

Ordering Clauses.

32. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j), that this Third Report and Order IS ADOPTED.

33. IT IS FURTHER ORDERED that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's Rules ARE HEREBY AMENDED as set forth herein.

34. IT IS FURTHER ORDERED that the rules adopted herein contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), and which

WILL BECOME EFFECTIVE after the Commission publishes a notice in the Federal Register announcing such approval and the relevant effective date.

List of Subjects in 47 CFR Part 73

Radio broadcast services

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 to read as follows:

PART 73 – RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Section 73.3573 is amended by adding new paragraph (f)(6) and adding new Note 5 at the end of the section to read as follows:

§ 73.3573 Processing FM broadcast station applications.

* * * * *

(f) * * *

(6)(i) When a non-reserved channel FM allotment is added to the Table of FM Allotments using the Tribal Priority described in Note 5 to this section, the FCC will specify by Public Notice a window filing period during which only those applicants that satisfy all of the eligibility criteria listed in Note 5 to this section with regard to the specific Tribal Priority FM allotment(s) listed in the Public Notice may file a long-form application for the Tribal Priority FM allotment. Only applications from applicants meeting the “threshold qualifications” listed in Note 5 will be accepted during this window filing period.

(ii) If only one application for the Tribal Priority FM allotment is accepted for filing during the threshold qualifications window, the long-form application will be processed. If two or more applications for the Tribal Priority FM allotment are accepted for filing during the threshold qualifications window, the FCC will specify by Public Notice a period of time, after the close of the threshold qualifications window but before the next

FM auction, during which the parties may negotiate a settlement or bona fide merger, as a way of resolving the conflict between their applications. Parties to a settlement must comply with § 73.3525 of the Commission's rules. If a settlement or bona fide merger is reached, the surviving application will be processed. If no settlement or bona fide merger is reached among the threshold qualifications window applicants, the Tribal Priority FM allotment will be offered at auction as described in paragraphs (f)(2) through (f)(5) of this section, except that only those applicants whose applications were accepted for filing pursuant to paragraph (f)(6)(i) of this section may participate in the initial auction of the Tribal Priority FM allotment.

(iii) If no application is accepted for filing during the threshold qualifications window, and the party that initially proposed the Tribal Priority FM allotment requests by letter to the Audio Division, Media Bureau, that its pending long-form application not be immediately processed, the Tribal Priority FM allotment will be auctioned as described in paragraphs (f)(2) through (f)(5) of this section in the normal course for vacant FM allotments. When a Tribal Priority FM allotment is offered at auction for the first time, only those applicants meeting the threshold qualifications for that specific Tribal Priority FM allotment, as described in Note 5 to this section, may participate in the auction of that allotment.

(iv) Should no applicant meeting threshold qualifications, as described in Note 5 to this section, apply to bid on a Tribal Priority FM allotment in the first auction in which it is offered, or should no applicant meeting threshold qualifications qualify to bid in the first auction in which a Tribal Priority FM allotment is offered, then the Tribal Priority FM allotment will be offered in a subsequent auction. Any such subsequent auction of a

Tribal Priority FM allotment shall proceed as described in paragraphs (f)(2) through (f)(5) of this section, and any qualified applicant may participate in the auction of the Tribal Priority FM allotment in such subsequent auction, regardless of whether it meets the threshold qualifications with regard to that specific Tribal Priority FM allotment.

* * * * *

Note 5 to § 73.3573. The “Tribal Priority” is that established by the Commission in Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket 09-52. See First Report and Order and Further Notice of Proposed Rule Making, MB Docket 09-52, FCC 10-24, 75 FR 9797, 75 FR 9856, 75 FR 73976; Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, MB Docket 09-52, FCC 11-28, 76 FR 14362, 76 FR 18942; Third Report and Order, MB Docket 09-52, FCC 11-190. To qualify for the Tribal Priority, and thus meet “threshold qualifications” for a particular allotment, an applicant must demonstrate that it meets all of the following eligibility criteria: (a) The applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes. Qualifying Tribes or Tribal entities must be those at least a portion of whose Tribal Lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose Tribal Lands lie within the facility’s principal community contour; (b) (1) at least 50 percent of the area within the proposed principal community contour is over that Tribe’s Tribal Lands, or (2) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe’s Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands,

and (iii) the total population on Tribal Lands residing within the proposed service contour constitutes at least 50 percent of the total covered population (and, in the case of either (b)(1) or (b)(2) the proposed principal community contour does not cover more than 50 percent of the Tribal Lands of a Tribe that is not a party to the application); (c) the proposed community of license must be located on Tribal Lands; and (d) the proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license. For purposes of this section, the definition of “Tribal Lands” is the same as that set forth at footnote 15 of the First Report and Order and Further Notice of Proposed Rule Making, FCC 10-24, and as further set forth at paragraphs 8-10 and 59 of the Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, FCC 11-28.

[FR Doc. 2012-967 Filed 01/19/2012 at 8:45 am; Publication Date: 01/20/2012]